A

SENTORIA BORNEO LAND SDN BHD v. HWONG HOE HING & ORS; TRIBUNAL FOR HOUSING PURCHASER CLAIMS SARAWAK (INTERVENER)

HIGH COURT SABAH AND SARAWAK, KUCHING
LEONARD DAVID SHIM J
B [ORIGINATING SUMMONS NO: KCH-24-104-12-2023 (HC4)]
7 NOVEMBER 2024

Abstract – *There is no requirement for a purchaser to wait until the issuance of an occupation permit or delivery of vacant possession or expiry of the defect liability period before a claim for liquidated ascertained damages ('LAD') can be made to the Tribunal for Housing Purchaser Claims. A claim for LAD is recognised even without the delivery of vacant possession to the purchaser. Furthermore, there is nothing in ss. 42 and 43 of the Sarawak Housing Development (Control and Licensing) Ordinance 2013 that restricts the intervener from hearing claims for LAD before the issuance of an occupation permit or before the setting off of a defect liability period. The court ought not to read more into ss. 42 and 43 than what is written and intended by the Legislature.*

C

D

E

CIVIL PROCEDURE: *Preliminary objection – Originating summons – Mode of commencement – Award made by Tribunal for Housing Purchaser Claims ('Tribunal') – Whether deemed to be order of Magistrates' Court or Sessions Court – Whether Tribunal awards may be challenged in any proceedings brought for purpose of declaring void and setting aside awards – Sarawak Housing Development (Control and Licensing) Ordinance, 2013, s. 52(1)*

F

CIVIL PROCEDURE: *Jurisdiction – Housing developers – Tribunal for Housing Purchaser Claims ('Tribunal') – Jurisdiction – Purchasers filed claims for liquidated ascertained damages ('LAD') before Tribunal – Whether Tribunal could only assume jurisdiction to determine claims after occupation permit issued or after defect liability period started to run or when purchasers had taken vacant possession – Whether LAD claims premature – Whether awards made by Tribunal valid and binding – Whether there was breach of ss. 42 and 43 of Sarawak Housing Development (Control and Licensing) Ordinance, 2013*

G

H

LAND LAW: *Housing developers – Tribunal for Housing Purchaser Claims ('Tribunal') – Jurisdiction – Purchasers filed claims for liquidated ascertained damages ('LAD') before Tribunal – Whether Tribunal could only assume jurisdiction to determine claims after occupation permit issued or after defect liability period started to run or when purchasers had taken vacant possession – Whether LAD claims premature – Whether awards made by Tribunal valid and binding – Whether there was breach of ss. 42 and 43 of Sarawak Housing Development (Control and Licensing) Ordinance, 2013*

I

STATUTORY INTERPRETATION: *Construction of statutes – Intention of legislature – Sarawak Housing Development (Control and Licensing) Ordinance, 2013, ss. 42 & 43 – Whether to protect innocent purchasers from consequences of developer's failure to deliver vacant possession or abandonment of housing project – Whether restricts Tribunal for Housing Purchaser Claims from hearing liquidated ascertained damages claims before issuance of occupation permit or before setting off of defect liability period*

Enclosure 1 was an action for a declaration that the Tribunal for Housing Purchaser Claims Sarawak ('Tribunal') had no jurisdiction to hear the 36 cases and thus the Tribunal awards in the said cases were null and void and to be set aside. The plaintiff, the developer of a housing development project ('project'), entered into separate sale and purchase agreements with the respective defendants where the plaintiff was the vendor and the respective defendants were the purchasers of their respective units in the project ('SPAs'). The project was 95% completed and the occupation permit had not been issued and vacant possession had not been delivered to the defendants up until the date of this originating summons. As such, the defect liability period had yet to run. The defendants have respectively filed their claims for LAD before the Tribunal/intervener between the period of year 2020 to 2023. The intervener had heard the claims filed and granted the Tribunal awards for LAD to the respective defendants between the period of 2020 to 2023. The plaintiff contended that by reading s. 42(3) of the Sarawak Housing Development (Control and Licensing) Ordinance, 2013 ('Ordinance'), together with s. 43(2) of the same Ordinance, and cl. 23(3) of the SPAs, the Tribunal/intervener shall only assume the jurisdiction to hear the defendants' claims for LAD which was based on the causes of action arising from the SPAs (i) after the occupation permit had been issued or after the defect liability period as set out in the SPAs had started to run, whichever was later; and (ii) when the defendants have taken vacant possession of their respective parcels. The plaintiff contended that the defendants' claim for LAD was premature due to the reason that there was no actual accrual of action. Due to the aforesaid reasons, the plaintiff contended that the intervener had no jurisdiction to hear the defendants' claim for LAD and had no jurisdiction to grant the Tribunal awards for LAD to the defendants. Thus, the plaintiff submitted that the Tribunal awards for LAD granted by the intervener were in breach of ss. 42 and 43 of the said Ordinance and illegal, null and void and ought to be set aside by this court. The main issue for determination was whether the Tribunal had no jurisdiction to decide on the defendants' claims for LAD and to make the awards unless and until the occupation permits were issued and delivery of vacant possession of the units had taken place. The intervener raised a preliminary objection to this action on the ground that the Tribunal was exercising a statutory function and duty in hearing and making the Tribunal awards and the defendants were exercising a statutory right in bringing their claim for LAD to the Tribunal.

A Thus, the intervener contended that the proper mode of commencement of proceedings to challenge the Tribunal awards was by way of judicial review. The defendants also raised similar arguments or points in their respective submissions.

B **Held (dismissing encl. 1):**

(1) Under s. 52(1) of the said Ordinance, every award made by the Tribunal under s. 49 shall be deemed to be an order of a Magistrates' Court or a Sessions Court, as the case may be, and be enforced by any party to the proceedings. As the award made by the Tribunal was deemed to be
C an order of the Magistrates' Court or Sessions Court and in the event that it was made in breach of statute and/or made without jurisdiction, it may be declared void and set aside or impeached in any proceedings brought for that purpose. In the case of *Eu Finance Bhd v. Lim Yoke Foo,* the Federal Court stated that such order is a nullity and it can be disregarded and impeached in any proceedings before any court or
D Tribunal and whenever it is relied upon. In other words, it is subject to collateral attack. Thus, the plaintiff may challenge the Tribunal awards in any proceedings brought for the purpose of declaring void and setting aside the said awards. Whether or not the plaintiff could succeed in such proceedings would depend on the facts, evidence and the applicable law.
E The plaintiff was not restricted to applying for a judicial review for the purpose of challenging or setting aside the Tribunal awards. In the premises, the preliminary objection or issue raised by the intervener on the wrong mode of commencement of this action by originating summons was disallowed. (paras 25 & 26)

F **(2)** There was nothing in s. 42 of the Ordinance which states that the Tribunal has no jurisdiction to decide on the defendants' claims and to make the awards or that the purchaser/defendants must wait until the occupation permits are issued and the delivery of the vacant possession of the units before the defendants could claim for LAD. Section 43(1)
G and (2) does not provide that the Tribunal had no jurisdiction to hear the defendants' claims and/or the defendants have to wait until the occupation permits are issued and the delivery of the vacant possession of the units before the defendants could claim for the LAD. The court could not read more into ss. 42 and 43 than what is written and intended
H by the Legislature. (paras 29 & 31)

(3) The words in s. 42(3) of the Ordinance is clear and unambiguous. An ordinary or literal interpretation of s. 42(3) reveals that a claim before the Tribunal shall be filed 'at any time not later than' 18 months from the date of issuance of the occupation permit or before the expiry date
I of the defect liability period as set out in the sale and purchase agreement, whichever is later. It provides for a limitation period for the bringing of claims before the Tribunal. Thus, a claim for LAD could be filed at any time and not later than 18 months from the issuance of

occupation permit or expiry of the defect liability period, whichever is the later. There is no requirement for the purchaser to wait until the issuance of occupation permit or delivery of vacant possession or expiry of the defect liability period before a claim for LAD could be made to the Tribunal. (para 37)

(4) The plaintiff failed to deliver vacant possession to the purchasers and the 36 months' period for handing over of vacant possession had lapsed. A claim for LAD is recognised even without the delivery of vacant possession to the purchaser. Furthermore, there was nothing in ss. 42 and 43 of the Ordinance that restricted the intervener from hearing claims for LAD before issuance of an occupation permit or before the setting of defect liability period. (para 43)

(5) The failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed amounted to a renunciation or abandonment of the SPAs and a fundamental breach of contract. To interpret ss. 42, 43 and cl. 23(3) otherwise would lead to absurdity and was contrary to the intention of the Legislature in enacting the said Ordinance to protect the innocent purchasers from the hardship and consequences of failure of the developer to deliver vacant possession or abandonment of the housing project. The Tribunal had jurisdiction to hear the defendants' claims for LAD and to make the Tribunal awards. The defendants' claims for LAD were not premature. Hence, the Tribunal awards was valid and binding on the parties thereto. (paras 54 & 55)

Case(s) referred to:

ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors [2013] 8 CLJ 1020 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bahamas International Trust Co Ltd And Another Respondents v. Threadgold Appellant (1974) 1 WLR 1514 ***(refd)***

Charles Anthony Santiago v. Suruhanjaya Pilihan Raya, Malaysia & Anor [2013] 6 CLJ 154 HC ***(refd)***

Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors [2022] 4 CLJ 716 HC ***(dist)***

Chow Tat Chow & Anor v. Mammoth Empire Land Sdn Bhd [2021] CLJU 2142; [2021] 1 LNS 2142 HC ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1987] CLJU 62; [1987] 1 LNS 62 ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] CLJU 21; [1982] 1 LNS 21 FC ***(refd)***

Khairul Izman Kamal v. Lembaga Jurutera Malaysia [2023] CLJU 114; [2023] 1 LNS 114 HC ***(refd)***

O'Reilly v. Mackman & Ors [1982] 3 All ER 1124 ***(refd)***

Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor v. Ann Joo Steel Sdn Bhd & Another Appeal [2018] 4 CLJ 171 CA ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia [2009] 1 CLJ 192 CA ***(refd)***

S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC ***(refd)***

Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ 617 CA ***(refd)***

United Plumbing And Sanitation Sdn Bhd v. Taman Ratu Sdn Bhd & Another Case [2024] 8 CLJ 831 HC ***(dist)***

Xavier Kang Yoon Mook v. Insun Development Sdn Bhd [1995] 2 CLJ 471 HC ***(refd)***

Legislation referred to:

Housing Development (Control And Licensing) Ordinance, 2013 (Sarawak) (Cap 69), ss. 42(3), 43(1), (2), 49, 52(1)

Rules of Court 2012, O. 1A, O. 2 r. 1, O. 53 r. 3(6)

For the plaintiffs - M/s King Wei, Jacey Wong & Partners Advocs

For the defendant - M/s Tan, Yap & Tang Advocs

State Attorney General's Chambers

M/s Sandhu & Company Advocs

M/s Voon & Co Advocs

Reported by Suhainah Wahiduddin

JUDGMENT

(encls. 1 & 4)

Leonard David Shim J:

Introduction

[1] There are two matters fixed for hearing before the court. Enclosure 1 is an action for a declaration that the Tribunal for Housing Purchaser Claims Sarawak (the Tribunal) has no jurisdiction to hear the 36 cases listed in prayer 1 of encl. 1 and thus, the Tribunal awards in the said cases are null and void and to be set aside.

[2] Enclosure 4 is an application by the plaintiff for a stay of the Tribunal awards pending the final disposal of encl. 1 and its subsequent appeal, if any. In para. 24 of the plaintiff's submission in reply, encl. 95, the plaintiff submitted that encl. 4 is already rendered redundant because the court had already in the process of hearing the main action, hence, such interim stay is no longer necessary. It appears that the plaintiff has abandoned the application for an interim stay in encl. 4 and the only matter for the court to determine is the main action, encl. 1.

[3] The main ground for the plaintiff's action for declaration in encl. 1 is that pursuant to s. 42(3) of the Sarawak Housing Development (Control and Licensing) Ordinance, 2013 (the said Ordinance) read together with s. 43(2) of the said Ordinance, the Tribunal is only clothed with jurisdiction to hear the claim for Liquidated Ascertained Damages (LAD) upon the issuance of occupation permit and the delivery of vacant possession.

Salient Facts

[4] The plaintiff is the developer of a housing development project known as Ataria Resort (the said project) at Lot 8581 (Parent Lot 8110) and part of Lot 7686, Block 9, Salak Land District at Bandar Baru Samariang, Jalan Sultan Tengah, Kuching.

[5] The plaintiff had entered into separate sale and purchase agreement with the respective defendants where the plaintiff is the vendor and the respective defendants are the purchasers of their respective units in the project (the SPAs).

[6] The project was 95% completed and the occupation permit has not been issued and vacant possession has not been delivered to the defendants up until the date of this originating summons. As such, the defect liability period has yet to run.

[7] The defendants have respectively filed their claims for LAD before the Tribunal/intervener between the period of year 2020 to 2023.

[8] The intervener has heard the claims filed and granted the Tribunal awards for LAD to the respective defendants between the period of year 2020 to 2023.

Contention Of The Parties

[9] In summary, the plaintiff contends that by reading s. 42(3) of the said Ordinance together with s. 43(2) of the same Ordinance and cl. 23(3) of the SPAs, the Tribunal/intervener shall only assume the jurisdiction to hear the defendants' claims for LAD which is based on the causes of action arising from the SPAs:

(i) after the occupation permit has been issued or after the defect liability period as set out in the SPAs has started to run, whichever is later; and

(ii) when the defendants take vacant possession of their respective parcels.

[10] The plaintiff relied on *Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors* [2022] 4 CLJ 716; [2022] 10 MLJ 153 and *United Plumbing And Sanitation Sdn Bhd v. Taman Ratu Sdn Bhd & Another Case* [2024] 8 CLJ 831 to support their contention.

[11] The plaintiff contends that the project was at 95% completion and the occupation permit in respect of the defendant's respective parcels has yet to be issued and the vacant possession of the defendants' respective parcels has

A yet to be delivered to the defendants. Additionally, the defect liability period as set out in the SPAs has yet to run. As such, the defendants' claim for LAD is premature due to the reason that there is no actual accrual of action.

[12] Due to the aforesaid reasons, the plaintiff contends that the intervener has no jurisdiction to hear the defendants' claim for LAD and has no B jurisdiction to grant the Tribunal awards for LAD to the defendants.

[13] Thus, the plaintiff submits that the Tribunal awards for LAD granted by the intervener are in breach of s. 42 and s. 43 of the said Ordinance and illegal, null and void and ought to be set aside by this court. The plaintiff relied on the principle in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian* C *Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 and *Eu Finance Bhd v. Lim Yoke Foo* [1982] CLJU 21; [1982] 1 LNS 21; [1982] 2 MLJ 37 and followed in *Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor v. Ann Joo Steel Sdn Bhd & Another Appeal* [2018] 4 CLJ 171; [2017] 6 MLJ 397 to support their argument. D

[14] The eighth, ninth and 11th defendants (the first group of defendants) contend that this action is an abuse of process because the action relates to the decision of the public authority and can only be challenged by way of judicial review. See (i) *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 CLJ 192; [2009] 1 MLJ 676; (ii) *Ahmad Jefri Mohd Jahri v. Pengarah* E *Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145; (iii) *O'Reilly v. Mackman & Ors* [1982] 3 All ER 1124; and (iv) *Khairul Izman Kamal v. Lembaga Jurutera Malaysia* [2023] CLJU 114; [2023] 1 LNS 114; [2023] MLJU 114.

F **[15]** The first group of defendants submitted that since the Housing Tribunal is exercising a statutory right, the correct procedure should be to commence a judicial challenge by way of judicial review under O. 53 of the ROC 2012 and such non-compliance is not curable by way of O. 1A and/ or O. 2 r. 1 of the ROC 2012. See *Charles Anthony Santiago v. Suruhanjaya* G *Pilihan Raya, Malaysia & Anor* [2013] 6 CLJ 154.

[16] The first, second, third, fifth, tenth, 17th, 18th, 19th, 20th, 21th, 22th, 23rd, 24th, 25th, 26th, 27th, 28th, 30th, 31th, 32th, 33th, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41th, 42th, 43th, 44th, 45th and 47th defendants (the second group of defendants) contend that nothing in s. 42 and 43(1) and (2) H of the said Ordinance states that the Tribunal has no jurisdiction to decide on the defendants' claims and to make awards because the defendants have to wait until the occupation permits of the units are issued and the delivery of the vacant possession of the units before the defendants can claim for LAD or have the right to claim for LAD. The second group of defendants submit that the court cannot read more into ss. 24 and 43 of the said Ordinance than I what is written and intended by the Legislature. See *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617; [2004] 3 MLJ 17.

[17] The second group of defendants relying on *Bahamas International Trust Co Ltd And Another Respondents v. Threadgold Appellant* (1974) 1 WLR 1514 and *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101 submitted that construction/interpretation of the written document is a question of law for the court to decide and not for any parties to the suit. Therefore, the Tribunal alone is to decide on the construction/interpretation of cl. 23(1), (2) and (3). It is not for the plaintiff to now come before this court to complain that the Tribunal had no jurisdiction to hear the claims for LAD until the issuance of the occupation permit.

[18] The second group of defendants further submitted that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed tantamount to a renunciation or abandonment of the SPAs which entitled the defendants to claim for LAD against the plaintiff. See *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666; [1992] 1 MLJ 289 and *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471; [1995] 2 MLJ 91.

[19] The sixth, seventh, 12th, 13th, 14th, 15th and 16th defendants (the third group of defendants) have conceded to the plaintiff's action and had not filed any affidavit in opposition and submission.

[20] The 46th defendant had made appearance but he did not file any submission to oppose the plaintiff's application to set aside the Tribunal awards granted by the intervener.

[21] The intervener raised a preliminary objection and contends that the plaintiff in challenging the awards issued by the intervener, employed an incorrect mode of commencement. The intervener contends that the plaintiff ought to have filed an application for judicial review pursuant to O. 53 of the ROC 2012. See *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317.

[22] By virtue of O. 53 r. 3(6) of the ROC 2012, the plaintiff had failed to commence legal action under a proper mode and within the prescribed time of three months. Therefore, the intervener submitted that the plaintiff's present application by way of originating summons is unsustainable and/or otherwise is an abuse of the court process and ought to be dismissed by the court.

[23] The intervener submitted that should ss. 42(3) and 43(2) be construed or interpreted in the manner proposed by the plaintiff, then it would imply that all claims would be put on hold until both occupation permit is issued and vacant possession is delivered to file any claims which may cause delay in filing of claims for issues that arise earlier, potentially causing claimants to file out of time and lose their rights to seek legal redress.

A

Evaluation And Findings

[24] The intervener raised a preliminary objection to this action on the ground that the Tribunal was exercising a statutory function and duty in hearing and making the Tribunal awards and the defendants are exercising a statutory right in bringing their claim for LAD to the Tribunal. Thus, the intervener contends that the proper mode of commencement of proceedings to challenge the Tribunal awards is by way of judicial review. The first and second group of defendants also raised similar arguments or points in their respective submissions.

[25] A careful perusal of the originating summons (encl. 1) shows that the plaintiff is seeking to set aside the Tribunal awards on the ground that the same were made in breach of s. 42 and s. 43 of the said Ordinance and thus, the said Tribunal awards were made without jurisdiction and may therefore be declared void and set aside. Under s. 52(1) of the said Ordinance, every award made by the Tribunal under s. 49 shall be deemed to be an order of a Magistrate's Court or a Sessions Court, as the case may be, and be enforced by any party to the proceedings.

[26] As the award made by the Tribunal is deemed to be an order of the Magistrates' or Sessions Court and in the event that it was made in breach of statute and/or made without jurisdiction, it may be declared void and set aside or impeached in any proceedings brought for that purpose. In *Eu Finance* above, the Federal Court stated that such order is a nullity and it can be disregarded and impeached in any proceedings before any court or Tribunal and whenever it is relied upon. In other words, it is subject to collateral attack. Thus, the plaintiff may challenge the Tribunal awards in any proceedings brought for the purpose of declaring void and setting aside the said awards. See *Badiaddin* above. Whether or not the plaintiff could succeed in such proceedings would depend on the facts, evidence and the applicable law. The plaintiff is not restricted to applying for a judicial review for the purpose of challenging or setting aside the Tribunal awards. In the premises, the preliminary objection or issue raised by the intervener on the wrong mode of commencement of this action by originating summons is disallowed.

[27] The main issue for determination by the court is whether the Tribunal has no jurisdiction to decide on the defendants' claims for LAD and to make the awards unless and until the occupation permits are issued and delivery of vacant possession of the units has taken place.

[28] The jurisdiction of the Tribunal is clearly stated in s. 42 of the said Ordinance which states as follows:

> 42. (1) Subject to section 43, the Tribunal shall have jurisdiction to hear a claim which does not exceed one hundred and fifty thousand ringgit lodged under section 41.

(2) Any counter-claim arising out of the sale and purchase agreement to be filed before the Tribunal shall not exceed one hundred and fifty thousand ringgit.

(3) A claim before the Tribunal shall be filed at any time not later than eighteen months from the date of the issuance of the occupation permit or before the expire date of the defect liability period as set out in the sale and purchase agreement, whichever is later.

(4) Claims may not be split, nor more than one claim be brought, in respect of the same matter against the same party for the purpose of bringing it within the jurisdiction of the Tribunal.

(5) No claim shall be entertained by the Tribunal if there is already a suit filed in any civil court relating to the same issue in dispute.

(6) No proceedings of the Tribunal or award shall be set aside or quashed for want of form.

(7) (a) The Tribunal may during the proceedings of any claim where necessary, give notice to any financial institution or any other third party affected by the claim to be a party to the proceedings.

(b) For the purpose of paragraph (a), the Tribunal shall extend a copy of the claim, defence and a summary of the facts to relevant party.

(c) Upon receipt of the documents in para (b), the financial institution or third party shall within two weeks file their explanation or defence in the Tribunal.

(d) For the purpose of this section, the Tribunal may make an award against the financial institution or the third party.

[29] There is nothing in s. 42 which states that the Tribunal has no jurisdiction to decide on the defendants' claims and to make the awards or that the purchaser/defendants must wait until the occupation permits are issued and the delivery of the vacant possession of the units before the defendants can claim for LAD.

[30] In s. 43(1), (2) of the said Ordinance, it is clearly provided that the Tribunal has no jurisdiction in respect of the following claims:

43. (1) except as expressly provided under this Ordinance, the Tribunal shall have no jurisdiction in respect of any claim:

(a) for the recovery of land, or any estate or interest in land;

(b) in which there is dispute concerning:

(i) the entitlement of any person under a will or settlement, or on intestacy (including partial intestacy);

(ii) goodwill;

(iii) any chose in action; or

(iv) any trade secret or other intellectual property rights.

A (2) The jurisdiction of the Tribunal shall be limited to a claim by the purchaser that is based on a cause of action arising from a sale and purchase agreement entered into whether or not pursuant to this Ordinance.

[31] Section 43(1) and (2) does not provide that the Tribunal has no B jurisdiction to hear the defendants' claims and/or the defendants have to wait until the occupation permits are issued and the delivery of the vacant possession of the units before the defendants can claim for the LAD.

[32] The court cannot read more into ss. 42 and 43 than what is written and intended by the Legislature. In *Tribunal Tuntutan Pembeli Rumah* C *v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617; [2004] 3 MLJ 17, where the COA stated through Richard Malanjum JCA (as His Lordship then was) as follows:

18 With respect, we find the first assumption to be without any basis. There is nothing in the provisions establishing the Tribunal or related D thereto which can be said to support it. In our view while s 16M sets out the general jurisdiction of the Tribunal, it is s. 16N and in particular subsection 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal. Section 16N(2) reads: limitation of jurisdiction. (1) Except as expressly ... (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase E agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.

F 19 Sub-section 16N(2) does not stipulate a cutoff point by reference to date of agreement *vis-a-vis* jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of subsection 16N(2), that is to say: (a) whether the claim is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the G licensed housing developer and (b) whether the claim is 'brought by a homebuyer not later than 12 months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement'.

H 20 We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators. That was echoed in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 with these words: It must always be borne in mind that we are judges, not legislators. The constitutional function of I the courts is not only to interpret but also to enforce the laws enacted by parliament, In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form.

> The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret. per Seah SCJ at p 39.
>
> 21 In fact the need for a sale and purchase agreement as a condition-precedent in filing a claim has also been waived by subsection 16N(3) thereof which states that '(N)otwithstanding subsection (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing [2004] 3 MLJ 17 at 25 between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation'.
>
> 22 To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which parliament never intended to do so. Itis absurd in our view to say that parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile, the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which parliament intended to address when it legislated for the establishment of the Tribunal. As stated earlier, being a piece of social legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the Tribunal.

[33] The relevant sections read as follows:

> Jurisdiction of Tribunal
>
> 42. (3) A claim before the Tribunal shall be filed at any time not later than eighteen months from the date of the issuance of the occupation permit or before the expiry date of the defect liability period as set out in the sale and purchase agreement, whichever is later.
>
> Limitation of Jurisdiction
>
> 43. (2) The jurisdiction of the Tribunal shall be limited to a claim by the purchaser that is based on a cause of action arising from a sale and purchase agreement entered into whether or not pursuant to this Ordinance.

[34] The plaintiff contends, *inter alia*, that: (i) the intervener is only clothed with jurisdiction to hear the claim for liquidated ascertained damages upon the issuance of occupation permit and the delivery of vacant possession; and (ii) the project was at 95% completion and the occupation permit has not been issued and vacant possession has not been delivered to the defendants.

[35] The intervener contends that the intervener has the jurisdiction to handle claims filed at any time so long as it is within the timeframe specified (*ie*, within 18 months of the occupation permit issued or before the defect liability period expires) as provided under s. 42(3).

[36] The intervener further submits that the intervener's jurisdiction is not limited solely to claims for liquidated ascertained damages (LAD) that arise only after the issuance of an occupation permit and the delivery of vacant possession. The intervener has the jurisdiction to hear claims relating to any issues in the sale and purchase agreement as provided under s. 43(2) of the Ordinance.

[37] The words in s. 42(3) is clear and unambiguous. An ordinary or literal interpretation of s. 42(3) reveals that a claim before the Tribunal shall be filed "at any time not later than" 18 months from the date of issuance of the occupation permit or before the expiry date of the defect liability period as set out in the sale and purchase agreement, whichever is later. It provides for a limitation period for the bringing of claims before the Tribunal. Thus, a claim for LAD could be filed at any time and not later than 18 months from issuance of occupation permit or expiry of the defect liability period, whichever is the later. There is no requirement for the purchaser to wait until the issuance of occupation permit or delivery of vacant possession or expiry of the defect liability period before a claim for LAD can be made to the Tribunal.

[38] At the outset, it is not disputed here that the intervener is established under the Ordinance to specifically address claims by purchasers, and that the intervener's jurisdiction is rooted in ss. 42 and 43 of the Ordinance.

[39] It is observed in the case laws set out hereinafter that courts are inclined to adopt a broader interpretation of the intervener's jurisdiction when it comes to protecting the rights of the purchasers.

ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors [2013] 8 CLJ 1020; [2013] 9 MLJ 193 at pp. 1034 to 1035 (CLJ); p. 207 (MLJ):

> [28] It must be stressed that the Tribunal was established under the HDA to deal specifically with claims lodged by a homebuyer. That was the primary source of jurisdiction of the Tribunal – a claim lodged by a house buyer under s. 16L of the HDA and s 16M of the HDA. In s. 16A it was provided that a 'homebuyer' meant a purchaser and read together with the definition of 'purchasers' in s. 3 of the H DA it was 'any person who purchased housing accommodation or ... ' .
>
> This avenue for remedy, statutorily provided to a homebuyer, for a expeditious resolution of claims arising from a sale and purchase agreement entered into with persons engaged in housing development, provided claims did not exceed RM50,000 (now), should not be allowed to be defeated merely because the party involved in the housing development, by choice, was not a licensed housing developer.

> [30] Accordingly it was my view applying the principles outlined above, which called for a purposive approach to be taken by the courts in interpretation of statutory provision, and also following the instructive words of Lord Denning quoted above, that if necessary words have to be read into a statutory provision to prevent it giving rise to an absurd or unjust situation, the phrase 'licensed housing developer' would also include such persons or entities who were required to be licensed under the HDA to undertake housing development but had not done so. In this case, it would include the contractor/vendor, though 'unlicensed' under the HDA. On this score too, it was my conclusion that the decision of the President of the Tribunal to seize jurisdiction and deal with the purchaser's claim was not tainted with illegality or procedural impropriety, as was submitted by counsel for the contractor/vendor.

Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ 617; [2004] 3 MLJ 17 at p. 27 (CLJ); p. 25 (MLJ):

> [22] To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which parliament never intended to do so. It is absurd in our view to say that parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile, the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which parliament intended to address when it legislated for the establishment of the Tribunal. As stated earlier, being a piece of social legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the Tribunal.

[40] The intervener submits that the plaintiff ought not to cherry pick ss. 42 and 43 of the Ordinance to limit the intervener's jurisdiction to hear a purchaser's claim.

[41] The intervener's jurisdiction to award LAD is not contingent upon the issuance of an occupation permit or the delivery of vacant possession by the plaintiff.

[42] The case of *Chow Tat Chow & Anor v. Mammoth Empire Land Sdn Bhd* [2021] CLJU 2142; [2021] 1 LNS 2142 reflects the legislative intent to protect purchasers from undue delay of the developer:

> [16] In *Ganda Selat* case (above), the learned High Court Judge held as follows: "It is of the considered view that the presence of the words "shall be liable to pay" in sub-clause 26(2) of the SPAs is significant to mean that the defendant's right to be paid LAD is automatic once there is delay by the Developer/vendor to hand over vacant possession to the defendants as purchasers of the units.

A

> On a proper construction of clause 26(2) of the SPAs it is clear that a housing developer is immediately liable to a purchaser in liquidated damages once the date of completion passes.
>
> ... The courts have recognized the dam for LAD even without the delivery of vacant possession to the purchasers,

B

> Before this court, there is no evidence proffered by the plaintiff (developer) to show or justify why the plaintiff fails to complete the project. All the respective SPAs are now incapable of performance through no fault of the defendants (purchasers). The plaintiff is the defaulting party herein who has breached the SPAs entered with the defendants in failing to complete the project within 36 months stipulated period. To allow the plaintiff to use Clause 26(3) of the SAPs in that no vacant possession has taken place and that therefore the defendants are not entitled to LAD as yet, would be absurd and contrary to clause 26(2) of the SPAs and will cause injustice to the defendants ...

C

D

[43] In this present case, it is not disputed that the plaintiff had failed to deliver vacant possession to the purchasers and the 36 months period for handing over of vacant possession has lapsed. A claim for LAD is recognised even without the delivery of vacant possession to the purchaser. See *Chow Tat Chow* above. Furthermore, there is nothing in ss. 42 and 43 of the Ordinance that restricts the intervener from hearing claims for LAD before

E

issuance of an occupation permit or before the setting of defect liability period.

[44] The plaintiff argues that ss. 42 and 43 of the Ordinance should be read conjunctively, asserting that the intervener can only hear and award liquidated damages when the occupation permit has been issued and vacant

F

possession is delivered.

[45] The plaintiff's reading would undermine the protective purpose of the Ordinance. In *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60, at p. 77 the court held that:

G

> (3) The HDA and its subsidiary legislation were social legislation enacted for the protection of buyers. In interpreting social legislation, the State having statutorily intervened. the courts had to give effect to the intention of Parliament and not to the intention of the parties. Otherwise, the legislature's attempt to level the playing field by mitigating the inequality in bargaining power would be rendered nugatory and illusory. Even where a term or provision in a social Legislation or statutory contract enacted thereunder was literally clear or unambiguous the court was obliged to ensure that the term or provision was interpreted in a WQY which ensured maximum protection of the class in whose favour the social legislation was enacted ...

H

I

[46] From the above, there is merit in the intervener's submission that requiring both an occupation permit and vacant possession before awarding LAD would unjustly penalise purchasers for developers' delays, contradicting the protective aims of the said Ordinance. Therefore, this court would adopt a liberal and purposive approach to when interpreting the ss. 42 and 43 of the said Ordinance in relation to the intervener's jurisdiction.

[47] The case of *Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors* [2022] 4 CLJ 716; [2022] 10 MLJ 153 which was cited in para. 30 of the plaintiff's submission is distinguishable for the following factors:

(i) there was delivery of vacant possession.

(ii) extension of time was obtained by the developer and approved by the housing controller.

(iii) an existence of a settlement agreement between the housing developer and the purchasers.

[48] Similarly, the case of *United Plumbing And Sanitation Sdn Bhd v. Taman Ratu Sdn Bhd & Another Case* [2024] 8 CLJ 831 at para. 32 of the plaintiff's submission is distinguishable. The facts therein differ greatly against our present case in that, the developer is prevented from delivering vacant possession to the purchasers due to the occurrence of a landslide. The legal principles applied in those cases depended upon specific factual circumstances which were not present in the case at hand.

[49] The second group of defendants submit that there is no evidence before this court to even remotely show or prove that the units will be completed at any time in the near future or even in future. There is no evidence before this court to even show any commitment at all as to when the units will be completed with OPs. 30. All the units have only been completed to 95% since 2018 or 2019 and there have no further work or construction for the last five to six years. This is shown by the last certificates of work completed which certified that the works were completed to 95% in 2018 and 2019. The plaintiff did not give any evidence of any entitlement to extension of time under the provision of the S&Ps (cl. 24) and therefore, the agreed dates of delivery of vacant possession are the dates set out in the Schedule in 2018, 2019 and 2020 as set out in the SPAs.

[50] Other than alleging that the Tribunal has no jurisdiction to hear the defendants' claims for LAD when the occupation permit has yet to be issued and vacant possession has not been delivered, the plaintiff did not and/or failed to state or give any credible assurance or evidence as to when the units would be completed in the affidavit in support (encl. 2).

[51] The second group of defendants submit that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed tantamount to a renunciation or abandonment of the S&Ps which entitled the defendants to claim for LAD against the plaintiff. In

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666; [1992] 1 MLJ 289, the High Court allowed the plaintiff's claim for liquidated damages despite the defendant did not and failed to complete and deliver the vacant possession of the apartment since 1988. It was held that:

> In this case *Newacres* disregarded the plaintiffs' claims for liquidated damages. I do not need to consider what may have happened if they had paid it from time to time. Time was of the essence. By February 1989 there was a delay of nearly a year. I regard the total failure of Newacres to give any credible assurances as to if and when the project would be completed to amount to a renunciation or abandonment of the agreement. Their conduct amounted to a fundamental breach of contract. *Law Ngei Ung & Anor v. Tamansuri Sdn Bhd* 3 is very much in point. Mr Tan, who urged everything which could be said for Newacres, relied very heavily on *Loh Wai Lian v. SEA Housing Corp Sdn Bhd* 4 and particularly on the second paragraph at p 4 as supporting his proposition that the only remedy a purchaser has in these circumstances is a cause of action for liquidated damages, and that in all cases this cause of action does not accrue until the day when vacant possession is delivered because it is only on that day that the single sum to be paid can be ascertained and so only thereby becoming due and be sued for. With respect I am unable to agree that the case supports such a sweeping proposition. The obligation to pay liquidated damages is only one remedy for late delivery which if accepted will be in substitution of all others. 34. Without any assurance of completion, what the Pltf is submitting or implying that the Pltf is protected by clause 23(2) & (3) of the S&Ps from having to pay the Defs LAD until the delivery and taking of vacant possession of the Units by the Defs. This literally means that the Defs are powerless to claim the LAD in the face of sheer arrogance exhibited by the Pltf by not giving any assurance of completion and delivery of vacant possession with issuance of OPs.

[52] The purpose of the enactment of the HDO 2013 is to protect the defendants and purchasers. This is clearly stated by the Privy Council in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1987] CLJU 62; [1987] 1 LNS 62; [1988] 1 MLJ 69 at p. 71:

> It is not surprising that the co-operative society rejected a draft building contract which appeared to flout the terms of the Act of 1966 and was inconsistent with the express provisions of the first contract. The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses. By the first contract and by the appellants' own nomination of themselves as developers, the appellants became engaged in the business of housing development by agreeing to construct more than four units of housing accommodation in one development with the view of selling the housing

> accommodation thus constructed. By the first contract and the appellants' own nomination as developers, the appellants sold the sites of the terrace houses for the land purchase price, agreed to level and clear the sites for the development price and agreed to construct the terrace houses with a view of selling the same to the cooperative society for the construction price.

[53] In *S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31, the FC at p. 311 (CLJ); p. 34 (MLJ) stated:

> With great respect to Mr. Chelliah for the developer we do not agree that it is open to the developer to escape liability by inserting clause 32 in the agreement. It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why rule 12 was enacted and in particular paragraphs (o) and (r) thereof. With respect we do not agree with Mr. Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as clause 32 in this agreement.

[54] There is merit in the second group of defendants' submission that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed amounts to a renunciation or abandonment of the SPAs and a fundamental breach of contract. See *Tan Yang Long* above. To interpret ss. 42, 43 and cl. 23(3) otherwise would lead to absurdity and is contrary to the intention of the Legislature in enacting the said Ordinance to protect the innocent purchasers from the hardship and consequences of failure of the developer to deliver vacant possession or abandonment of the housing project. See *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471; [1995] 2 MLJ 91.

Conclusion

[55] In the final analysis and for the foregoing reasons, the court finds that the Tribunal has jurisdiction to hear the defendants' claims for LAD and to make the Tribunal awards and the defendants' claim for LAD is not premature. Hence, the Tribunal awards is valid and binding on the parties thereto.

[56] Based on the aforesaid reasons, encl. 1 is dismissed with costs in the sum of RM2,000 to each of the first and second group of defendants and the intervener (totaling RM6,000) to be paid by the plaintiff subject to allocatur fee.

[57] As submitted by the plaintiff, encl. 4 is redundant and is dismissed with no order as to costs.